

MINUTES

PLANNING COMMITTEE

February 3, 2016

A meeting of the Planning Committee of the Council of the County of Kaua'i, State of Hawai'i, was called to order by Mason K. Chock, Chair, at the Council Chambers, 4396 Rice Street, Suite 201, Līhu'e, Kaua'i, on Wednesday, February 3, 2016, at 9:12 a.m., after which the following Members answered the call of the roll:

Honorable Gary L. Hooser
Honorable Arryl Kaneshiro
Honorable Ross Kagawa
Honorable KipuKai Kuali'i
Honorable Mason K. Chock
Honorable JoAnn A. Yukimura, Ex-Officio Member
Honorable Mel Rapozo, Ex-Officio Member (*present at 9:13 a.m.*)

The Committee proceeded on its agenda item as follows:

Bill No. 2601 A BILL FOR AN ORDINANCE AMENDING SUBSECTION 8-15.1(d), KAUAI COUNTY CODE 1987, AS AMENDED, RELATING TO ADDITIONAL DWELLING UNIT ON OTHER THAN RESIDENTIALLY ZONED LOTS (**This item was Deferred.**)

Councilmember Kaneshiro moved for approval of Bill No. 2601, seconded by Councilmember Kagawa.

Committee Chair Chock: I have a notice from the Administration to ask for a deferral, which is also supported by our County Attorney, for a question posed by a few members and the Administration. We thought this question might have been asked previously, but apparently in looking at our records and investigating a little bit today, we found that it is not and it is really about whether or not the entitlement upon a subsequent conveyance of the real property holding would continue with the Additional Dwelling Unit (ADU). I think it is an important question for us to answer, moving forward for all of our land use issues and I would like to honor that deferral if possible. Councilmember Yukimura.

(Council Chair Rapozo was noted as present.)

Councilmember Yukimura: The question that has been sent to the County Attorney and is asking for an opinion on it is, "Can the Bill be legally amended to include a provision which invalidates a duly recognized ADU entitlement from subsequent conveyance of the real property holding that entitlement?"

Committee Chair Chock: Correct.

Councilmember Yukimura: That provision is not in the Bill presently, right?

Committee Chair Chock: What is the question?

Councilmember Yukimura: That provision is not in the Bill presently?

Committee Chair Chock: That is correct.

Councilmember Yukimura: Is there a Councilmember wanting to put that on?

Committee Chair Chock: I do not know. I know that the question has been made by several...

Councilmember Yukimura: If nobody wants to amend the Bill, then why do we need to know the answer to the question?

Committee Chair Chock: Well, maybe others can chime in and ask where this direction might be going.

Councilmember Yukimura: Is the Administration going to propose that?

Councilmember Kagawa: I think where Councilmember Chock kind of heard it was...I think Mr. Abreu brought it up. Several members of the public who testified had brought up some of that concern at the public hearing, but my underlying thoughts on this issue is broader in that taking advantage of public perception that one gets an advantage in speculation, and then hurting the island of Kaua'i—I think we need to apply this type of law on a broader scale to Transient Vacation Rentals (TVRs), bed and breakfasts (B&Bs), and everything, and not just look at agricultural ADUs. I think if we want to seriously attack this problem, then we need to attack it in all areas and I would like to see some serious effort going to it, because I believe that the underlying thought that this is the way to try and slow down or prevent rapid speculation from going on around this island, I think we need some type of legislation in this area, but we may be prevented. I have heard many times, "Well, the rights go with the land." If that is the issue, then I think we know the answer. Anyway, that is my thoughts. Still, I would like to see more effort by the attorneys to see if there is some other way. If the public keeps bringing it up, there must be some type of legislation. I do not know if it is going to the State Legislature to try and help us solve this problem. I would like to see the County attorneys take us to a higher level and see what further we can do to try and prevent speculation on Kaua'i. Thank you.

Committee Chair Chock: Any other questions on the request for these questions to be answered?

Councilmember Yukimura: Can we have the Planning Director come forward?

Committee Chair Chock: Sure. I will suspend the rules if there are no objections. Good morning, Mike.

There being no objections, the rules were suspended.

MICHAEL A. DAHILIG, Planning Director: Good morning, Councilmembers.

Councilmember Yukimura: Good morning, Mike. I think the Vice Chair did a good summary of the issue. You requested a deferral pending receipt of an opinion requested from the County Attorney's Office. The Planning Department has never requested an opinion to this effect.

Mr. Dahilig: Not as it pertains to this specific Bill.

Councilmember Yukimura: No, but to the issue of permits running with the land or entitlements running with the land.

Mr. Dahilig: In many contexts, we have.

Councilmember Yukimura: So you actually have a written opinion?

Mr. Dahilig: We do not have a written opinion as it pertains specifically to this issue, but if you were to ask what my judgment is on this, my suspicion would be that a certain opinion would come out of the County Attorney's Office. But I think given the testimony and the discussion that happened on first reading concerning the Bill, and then the amendment that the Planning Commission proposed as part of its recommendations upon approval, this issue did arise again. Just for due diligence and clarity's sake to ensure that the policy makers do have all the information possible in conversations with the Committee Chair, I thought it was appropriate to ask this question as to not have any other questions floating out there concerning the termination of the entitlement that may run with the land.

Councilmember Yukimura: If it were legal to invalidate an ADU permit upon conveyance, would the Planning Department recommend such a policy?

Mr. Dahilig: That is a very difficult question for me to answer right now. I know in the past, we have characterized the two hundred thirteen (213) units that we do have on the books as generally "mom and pop" types of operations and not what we see as speculative. The people that are engaged in speculative real estate—a lot of those individuals have already taken advantage of the...or corporations have taken advantage of the ADU entitlement many, many years ago. This is the way I am interpreting the Bill and after discussion on first reading, it was meant to provide those *kama'āina* families with the opportunity to get the equity to actually stand up their home. Nevertheless, if there was, let us say, down the line an opportunity to speculate versus providing homes for local people, then I think that is a policy question that has to be thought through. I am not prepared to answer given what I know factually as the general genre of who has the two hundred thirteen (213) entitlements right now.

Councilmember Yukimura: Conveyance should not affect it unless it prohibits conveyance to a family member.

Mr. Dahilig: That is where we get into concerns about consanguineous relationships that are prohibited in terms of characterizing what can or cannot be done in the genre of land use zoning and policy. I understand the policy poll to try to keep things in the family and I think it is a legitimate one, but whether we can do it constitutionally is the question that constantly squirrels around questions like this that were done as a reaction to over-speculation in the real estate market. I think that is why we have such a question as this to once and for all kind of get this out on the table.

Committee Chair Chock: Any further questions? Councilmember Kagawa.

Councilmember Kagawa: Mike, you can stop me if this does not relate, but we have a standard ADU law that in residential lots greater than ten thousand (10,000) square feet, you are allowed to apply for an ADU, provided that the lot coverage and what have you are met.

Mr. Dahilig: Yes.

Councilmember Kagawa: On a broader scale, are we even going in those areas? For me, let us be fair. If we are going to stop property rights, entitlements, and permits upon sale, then let us not just pick on agricultural ADUs; let us go after TVRs, B&Bs...residential...and that way we can hopefully slow down growth and stop the property values from skyrocketing. I guess the question is can we even go there? I hate to try and go in one area and all the other areas are deemed illegal. I think that just opens up a can of worms if it is not consistent.

Mr. Dahilig: I would agree with that statement. I think we try to maintain equity of enforcement across the board and it is just the best business practice for us because we do not have to recognize specific nuances to try to target a very small group of people. That was generally our recommendation to the Planning Commission on this Bill because when you look at the pool of people that are affected by this, it is significant, but in the overall scheme of enforcing tens of thousands of residential units on the island, this is in order of less than two-tenths of a percent. At this juncture, once the information does come up what we can and cannot do, I think it really begs a very deep policy discussion as to the equity concerns that you brought up because I certainly hear the public issues regarding how these units are treated in the future if a sunset were to be removed. If that puts policy to try to limit the conveyance of such an entitlement for this small group of people is somewhat viewed as unfair given the running entitlements that we have that are more noxious. Then I think it does beg a deeper discussion as to whether or not that is equitable.

Councilmember Kagawa: To clarify, you are saying that the big difference is that other permits are approved and the difference with this agricultural ADU permits is that sunset date, so that is why there is that difference and perhaps treating them differently could be testified maybe?

Mr. Dahilig: Yes, the historic nature, as you are aware of since you introduced the Bill, was that the entitlement was a fixed date and the running of the entitlement was to be vested only upon construction. This would convert that from an action that was required to something that runs with the land and I think there are pros and cons to doing that. As I stated earlier, we did come up recommending both from a departmental and the Planning Commission side of the Bill for operational reasons be approved. Again, I would state that it really does come down to this conversion of a limited entitlement to a perpetual entitlement and whether the comfort level with the Council, given the scope of those that are affected, is in-line with the general policy of the land use.

Councilmember Kagawa: Thank you, Mike.

Committee Chair Chock: Councilmember Kualii.

Councilmember Kualii: Mike, of the two hundred thirteen (213), do we know how they break down between single, individuals, or if it is a family property, if you will, and other corporations, group ownerships, or multiple properties?

Mr. Dahilig: We met last week and I had my staff start pulling the files because we have to do this by hand, but we are checking right now to try and get that information over to you. We will get it over to you in a transmittal.

Councilmember Kualii: When you talked about the "entitlement had a fixed date"—so that is the whole thing where several times that fixed date had moved and been extended.

Mr. Dahilig: Yes.

Councilmember Kualii: But legally, it was allowed to expire when the date came and it still can when the next sunset date comes. Correct? Or do we not know that?

Mr. Dahilig: As the way the law is right now currently, yes, there is a fixed date at which the entitlement will lapse if it is not vested via construction of the unit and that is ten (10) years.

Councilmember Kualii: Recently, that sunset was extended again.

Mr. Dahilig: To ten (10) years.

Councilmember Kualii: So the fixed date now is?

Mr. Dahilig: I believe 2024 or 2025.

Councilmember Kualii: So this Council or some future Council has the opportunity to allow that to expire.

Mr. Dahilig: I think in our analysis, that is correct.

Councilmember Kuali'i: It is still nine (9) years off.

Mr. Dahilig: Our analysis though is given the pool of these units is a very small pool, and given the potential institutional history that may be in the department ten (10) years from now, it could pose a problem down the line if people were to try to understand either via minutes or these types of things to try to figure out how to implement something like this again, because it pretty much remains in stasis for ten (10) years before this issue hits up again down the line. We did not end up with the large deluge of certifications that we potentially were concerned about, given the lack of accurate recording and filing. Because now we have a fixed amount, it really is a small amount. It would be for a future Council and a future department to enforce that.

Councilmember Kuali'i: Historically with each of the extensions where we have added more time so that more people could act on it, not a lot of people have been acting in each of those periods. Has it been ten (10) year periods each time?

Mr. Dahilig: No, they have been in the order of one (1) to three (3) years. This was the first situation, given the previous law that was passed, where recertification was actually required in this matter. Generally in the past, what has happened is extensions were just given based off of public comment and public testimony; not based off of any type of re-registration process. So we never knew what the fixed amount of units we were dealing with as it concerned to the policy changes that were enacted by this body.

Councilmember Kuali'i: At the risk of overgeneralizing, I will make a statement about why the department may be recommending that we just move from these every few years, making extensions to just allow that to go away with the perpetual...you talked about limited versus perpetual. Is it that because you have said that you see now that most of the properties remaining are the people that are interested in staying on the property and building for their families, and maybe they are not in the position financially and they are not even sure when they will be, but their future plans are that, so you are not anticipating the large amount of speculative activity that happened early on and that most of the speculators already acted. In reality, it is more of an administrative...too much a hassle for not a problem, and that you would rather focus your enforcement and monitoring more "noxious" type of entitlements.

Mr. Dahilig: Better stated than I could have said.

Councilmember Kuali'i: Okay. We are trying to find out with this legal question to distinguish between those single individual owners and the corporate or multiple owners that may likely do speculative behavior going forward, and really there is no way to treat them differently. I know you are figuring out which is which, but once we know that, we have to sort of like apply whatever rule we make going forward, whether it is limited or perpetual, to everyone.

Mr. Dahilig: Right. I would agree with that statement as well.

Councilmember Kualii: Okay. Thank you so much.

Committee Chair Chock: Councilmember Hooser.

Councilmember Hooser: Good morning.

Mr. Dahilig: Good morning.

Councilmember Hooser: In reading the language, "Can this Bill be legally amended to include a provision which invalidates a duly recognized ADU entitlement upon subsequent conveyance of the real property holding that entitlement?"—Is this question addressing undeveloped, but entitled ADUs or does it envision that we build an ADU in this...or developed...do you understand my question?

Mr. Dahilig: Yes, I do. I think the ADU entitlement right now is a non-vested entitlement, so given the Bill that was attached to the memorandum to the County Attorney, the question really relates to the unbuilt ADU entitlement versus somebody that vests it as a legal unit of record, and then sells it subsequently.

Councilmember Hooser: Okay. So it is intended to be an undeveloped ADU entitlement. If a person built an ADU and then sold it or sold their house, we are not talking about taking that away from them?

Mr. Dahilig: No.

Councilmember Hooser: Okay. I guess I am less concerned about the "speculation" because it seems like most of the people that were here were people living in different neighborhoods and residential areas. Even if they sold it, you can say it is speculation, but it is some value of their property and they could sell it in the future, so it is like any other entitlement. For existing ADUs in residential areas, as Councilmember Kagawa talked about, those could be sold separately, Condominium Property Regime (CPR) or whatever, right?

Mr. Dahilig: Right.

Councilmember Hooser: This represents two hundred thirteen (213).

Mr. Dahilig: Yes.

Councilmember Hooser: So that is two hundred thirteen (213) new houses that can be built today or tomorrow, which would house two hundred thirteen (213) families, and if some of those were investors, there is no guarantee they will be renters or family members or that kind of thing, even though that is the intent?

Mr. Dahilig: I think it could be characterized as the major reaction from the public in terms of what transpired when the program was first initiated and why the sunset was put in the first place. There was obviously a lot of

community concern, given what has happened and transpired previously. I think this question is meant to address some of what people have brought to the table of solutions to curb some of that reaction to the program in the past. Whether the department would or would not support something like this, I think it really begs the question in the details, because in the examples that you used, if we were to...let us say if a family member or the mom and dad want to sell or convey a second unit entitlement over to the son to obtain a construction loan, they would need to have the title in their name. Would that mean in effect that that invalidates the entitlement? That is why I think it is a little premature for us to say whether we would or would not support something like this if it was proposed on the table because it could have that type of effect on the type of families that this Bill is meant to help in the first place. Going back to how you are characterizing of what could happen, I would agree with those examples.

Councilmember Hooser: I am just trying to think this through, but it seems like if such a provision was placed on these properties, deemed to be legal and all of this, then the only way these homeowners would be able to capture their value would be to build it out. So they could build it out and then they could transfer it if they wanted to without losing that benefit.

Mr. Dahilig: Yes, and that was the vesting requirement that had been folded into a law going back many, many years already.

Councilmember Hooser: Okay. Thank you.

Committee Chair Chock: Further questions? At this time, I want to take public testimony as well. We can come back to discussion on how we want to move forward.

CODIE K. YAMAUCHI, Council Services Assistant I: Committee Chair, we have one (1) registered speaker, Glenn Mickens.

GLENN MICKENS: For the record, Glenn Mickens. You have a copy of my short testimony. I obviously cannot address the legality problem with this issue, but my friend Mauna Kea will have to decide that. I am completely in favor of Bill No. 2601, which takes a time limit off a person who wants to build an ADU on their own residential property. If they had their property permits and obtained them in a correct time period, then I see no reason that they should not be able to build whenever they have the funds to do so. I am highly against more large developments until the infrastructure is first put in place to handle the cars and people associated with it, but these one added units on private property are needed dwellings for family and friends, so I am completely for it. Thank you.

Committee Chair Chock: Thank you. Anyone else? Mr. Fukushima.

JESSE FUKUSHIMA: Good morning, Jesse Fukushima. I guess I came in at the latter half of what the Planning Director was mentioning, but for me, the thing is that there have been other entitlements throughout the history of the County that has been granted to the public. My question is why single-out the agricultural districts, the agricultural parcels? The ADU was applicable also to the residential units out there. So you are going to apply whatever you want to apply at

the agricultural level to say, "Hey, we want to put stoppers or deferrals on it if you decide to sell," and I do not think that is fair. We are talking about two hundred twenty (220) people that have endured the process from 1987, as I mentioned to Councilmember Yukimura, possibly those numbers were in the thousands, but one thousand (1,000), one thousand three hundred (1,300), or one thousand seven hundred (1,700) parcels or landowners got affected by this ADU. Throughout the decades, it dwindled down to two hundred twenty-three (223) or two hundred twenty-six (226) and I cannot understand the rhyme and logic why we are having a difficult time in trying to pass this. I know it is all against the rules and regulations and the densities of agriculture, but so did the County take the steps in saying, "Hey, for your R-4 lots or your R-2 lots, we can apply the ADU. Better yet, if you have a ten thousand (10,000) square feet lot and it is in sewer, we can put in another ADU." To a certain extent throughout the history of the County, we have tried to apply the concern of housing by changing the rules a little bit. It may have been against the grain of density for the residential zoned areas, but nevertheless, we saw the concept and the reason why we needed to address the housing issue, which will always be an ongoing thing and we need all the help we can get. Any questions? Thank you.

Committee Chair Chock: Thank you very much. Would anyone else like to testify? Seeing none, I will call this meeting back to order. I just want to say that I am guessing the direction on this, that this opinion will be in favor of the entitlement, but it has some broad-reaching implications that I think we should probably have a larger discussion on. The request is to get that opinion from our County Attorney for a deferral at this time. I will open it up for further discussion. Councilmember Hooser.

There being no objections, the meeting was called back to order, and proceeded as follows:

Councilmember Hooser: Thank you, Chair. After the discussion, I am ready to vote in support of the measure and I do not believe that we need to delay it any longer. We can wait for an opinion, but I think the underlying principle of trying to figure out a way to keep folks from doing things, I think, just gets too complicated and that we are dealing with two hundred thirteen (213) families, two hundred thirteen (213) homes, and I am willing to vote in support of not putting further restrictions on it and just passing the Bill as is. Thank you.

Committee Chair Chock: Thank you. Councilmember Yukimura.

Councilmember Yukimura: If our intent is to get an opinion for use beyond this particular issue, I have a feeling that we are not going to get the answer for things beyond this issue unless we specify the actual case we want an answer for. If it is, in fact, that we want to know whether we can terminate a vacation rental entitlement upon transfer of a conveyance of that entitlement, that is the question we should ask, because otherwise it is two (2) very different things and the opinion we get is not going to be directly applicable. I think it is a really worthy question to ask and I would love to see the establishment of the principle of a permit that runs through the person, not to the land. That makes a lot more sense to me because you could have a person that promises all the conditions and all of these things, and they will do it, but then they convey it to somebody who does not

really adhere to the promises. It is a complex issue. Anyway, as we struggle to find ways to enforce the law in cases of vacation rentals, for example, it is really good to see what tools we actually have. I do not believe we are going to get the answer to the vacation rental question through this question.

Committee Chair Chock: Any further discussion on this? The motion on the table now is to approve. If there is an interest to wait, then I will entertain that deferral. If not, I am willing to move forward as well. Councilmember Kagawa.

Councilmember Kagawa: I just want to state that we have a broader question that needs to be researched and then answered, and upon research you may find that we may have to go to even higher levels to try and change laws. I do not think it is going to be a simple answer. I think the possibilities of trying to address speculation...what I am talking about is not TVRs or B&Bs inside of the Visitor Destination Area (VDA). What I am talking about are TVR and B&B permits outside of the VDA that have special permit rights. How do we try and prevent those, as well as any other sales of other rights that we feel could be taken advantage as speculative and address all of those. I think for me, the list of two hundred seventeen (217) or whatever that is left—I have seen numerous families come up here. I would say it is over fifty percent (50%) that are just local families trying to address housing for their children and their family. If we do not allow these people to have these rights and to build when they have the necessary funds, they are going to have to look for housing elsewhere, which is very scarce and expensive. I think we are addressing affordable housing by extending this Bill and we are giving them comfort, knowing that this is the family plan going forward. When this child graduates from high school and college, this is their plan. We do not need to worry anymore about where they are going to live. This is why I think it is important that we address this. We talk about acquiring large parcels by Coconut Plantation and for millions of dollars to address affordable housing when we can address it here without it costing anything. I think the right thing to do is approve this and on a broader scale going forward, let us try and address whatever target areas we feel that we as lawmakers need to address to prevent speculation and prevent ridiculous market values from blowing up all over the place as they have in Hā'ena and Hanalei. I think we have a broader question and we can address that, but I think for today's item, I think I am ready, but I am okay with deferring for two (2) weeks to get that answer. I am either way with this, but really I feel like this will help a lot of local families, families that have been here for generations. In my view, these two hundred seventeen (217) are not those big, beautiful agriculture lots that are in 'Aliomanu and Kīlauea. These are ones that are just typical Wailua Homesteads areas and here and there agricultural parcels in Kapahi and Kalāheo, et cetera. I do not think these on this list are these agricultural subdivision types that have gentlemen farmers or whatever you call them. For the most part, I think these are just a lot of humble families that need the government's help to plan their futures. The right thing to do is to approve this. I am ready if everybody else is ready. Thank you, Chair.

Committee Chair Chock: Thank you. I am willing to move it forward as well. I do think that question is the question that needs to be answered. I just wanted to take a moment to read the report on the Committee of Planning from December 17, 2014. This was discussion on the floor with then Deputy County

Attorney Ian Jung regarding requiring a voluntary waiver or assurance from the property owner not to sell or transfer the certificate to a new owner. "Deputy County Attorney Jung stated that these entitlements or certificates run with the land. The focus is not made on who the person is or how the person will utilize the certificate. He stated that we live in a free-market society and things are bought and sold. The certificates cannot be restricted to a specific person, and must be recognized as an entitlement that runs with the land. Restricting the certificate to the person in current possession of it would be violating the United States Constitution free market clause. Additionally, with regard to creating new entitlements with restrictions, the vehicle to absorb that right has been recognized by past Councils as imposing a deadline." This is what we have been doing. "Deputy County Attorney Jung stated the past conditions of permits restricting transfer of entitlements have been held unconstitutional." Again, this is not a written opinion. I think that we should probably move forward on that request for an opinion; however, it is part of the larger question, and I would agree with some members to not hold this back at this time. Any further questions or discussion? Councilmember Yukimura.

Councilmember Yukimura: Well, what you just read indicates that there is a discrepancy between how the Planning Director views the certificate and how Ian Jung saw the certificate because the Director has said it is not an entitlement. Ian is talking about the certificate being an entitlement, but it is very enlightening to me that the Director showed, and I am presuming he has backup for it, that the entitlement vests only on construction, so it is not a real entitlement. It is a certificate, which may be a distinction. Having a well-documented opinion would be good if we want to really understand the nature of this "entitlement" that we are talking about. I would like to know if it is, in fact, just two (2) weeks that it will take to get this opinion. May we find out?

Committee Chair Chock: Further discussion before I ask the County Attorney to come up? Councilmember Hooser.

Councilmember Hooser: I want to make sure my position is clear that regardless of what the opinion says, I do not want to put further restrictions on these two hundred thirteen (213) owners. If the opinion says we can, I still will not support that position. That is number one. Number two, the opinion will be for the question we ask and in order to get a good opinion, it has to be a specific question. The circumstances will be what the circumstances are and the opinion will be that. It is unlikely they will be able to apply that opinion to other areas. That is my experience anyway because it depends. In my dealing with lawyers, they tell that it depends if this is a new entitlement or an old entitlement. It is an interesting question and it is an important question, but I think we need to make sure we ask the right question, and in this particular situation my position is that I do not want to put further restrictions on these particular property owners and this particular situation at this point. Thank you.

Committee Chair Chock: Thank you. The feeling around the table, it seems, as far as the Committee goes is to move this forward, so I think that is what we will be moving towards. However, I think to have the County Attorney...

Council Chair Rapozo: I have a couple of comments. I apologize for being late. I am not going to ask any questions that may have already been asked, but generally some comments...I do not vote today, so obviously the Committee will make the decision, but I am concerned about the opinions and the possible conflict and positions between Ian Jung and Mike Dahilig. I kind of agree with Councilmember Hooser, which I do not want to hold up and add more restrictions, but also, I still vividly remember the intent of this Bill and what the intent was. My concern is that if we let it go, and yes, some will say that it is only two hundred (200) or so units, but if we just let them go unrestricted, it is an incentive for people that currently have the house that currently want to build or save that lot for a son or a daughter. In other words, the speculative impact will increase the value of that home, of that property, to a point where it may change the mind of a family that wanted to keep the property, but because it becomes so lucrative, they will sell. That is my concern. I never did agree with that, and I am not a lawyer, and I do not know what the Supreme Court said or did not say, but I never did agree to that restriction that this Council could not restrict an entitlement when that property is sold. I just never bought that. I do not think that is fair or I do not think that is right. I think if we provide, especially where there was intent in this law—the intent was to keep the ability for the family to build an additional unit for a family. That was the original intent. If you have a use permit in Līhu'e in a residential area or you had a use permit to operate a doctor's office, that entitlement to run a business out of that residential area does not go on forever. If you change the use or change the purpose, you have to get another permit. The County imposed that requirement. If the intent or the use of that ADU is for residential, which is really what I thought the intent was, and then you have a person that owns the one house now and he or she wants to sell it because someone is going to offer them top dollar because now they can build an ADU for a TVR, high-end rental, or whatever, then we should be able to say no and say, "If you are not going to maintain the original intent of the ordinance, then the entitlement stops." I am not going to argue with the attorneys and the courts, but we have to be careful that you may convert out of the two hundred (200) or so units today that have the intent...majority of them might believe the intent is to maintain that property and eventually have their kids build on it...you open up a gate and say, "Hey, the way this entitlement goes, you can do whatever you want with it." I think you will convert some of those and they will say, "You know what, we will sell and put the money in the bank, and when the child is ready to build, they can build later somewhere else." I just want the members to think about the original intent and if this, in fact, creates a loophole for speculators. The intent of this original ordinance was not to allow people the opportunity to build an extra house to make money; it was to put family members in homes. Again, I am going to read the minutes because I do not want to waste any more time of what was already said, but I think more questions need to be asked of the County Attorney's Office. That is my position. I will be putting some questions together. Moving it forward does not hurt because if there are still questions or concerns next week, it could still be deferred or referred. I want to give these owners the assurance that they will be able to build their homes for their families at some point, so I am all good with that. I do not want to see potential families start considering selling it because all of a sudden the entitlement is everlasting and now the value of that home possibly doubles or maybe triples. I do not think we should be facilitating that. That is just my comments and I will obviously respect whatever the Committee decides. Thank you.

Committee Chair Chock: Thank you. If there is no more discussion, I would like to ask the County Attorney...

Councilmember Yukimura: I would like to have more discussion.

Committee Chair Chock: Okay. I am sorry. I am going to start with Councilmember Kualii.

Councilmember Kualii: I was going to say before Chair Rapozo made his comments that I have the same views in the whole thing about an entitlement. I heard the Planning Director say that this ADU entitlement is a non-vested entitlement. So I think Councilmember Yukimura's point about it becomes an entitlement upon construction is important. I think the decision we are making today is not a necessary or critical one, because in December, we already made an allowance by making the last extension that now goes to 2024. So all thirteen (13) property owners right now continue to have the non-vested entitlement now to construct the home before 2024 and could make the entitlement real and keep it within their family, get it for their son or daughter, or grandson or granddaughter. It makes more sense that instead of to do this perpetual...regardless of what the law says. If the law tells us we can or we cannot, that only has to do with language about preventing speculation. It is already in our power now to leave it as is, have those families construct their homes before 2024, and when 2024 comes, however many are remaining, if that Council again wants to still allow, they could do another ten (10) years. I think it is already a benefit that it is not one (1) year, two (2) years, or three (3) years. There is this large period now and a lot could change in ten (10) years. The kids grow up and they become contributors to the mortgage or the ability to build a home. I do not see the reason that we have to push this and that we have to rely on any kind of opinion, because probably the opinion is like TVRs where we cannot take away somebody's individual right, but they do not actually have that right now, so we do not need to take it away. They will take it away from themselves by not building and allowing the 2024 deadline to come. Yet at that time, that Council, in their wisdom, might decide that for different reasons they need to extend it again. I am totally in agreement with the Council Chair in not wanting to move forward with this.

Committee Chair Chock: Councilmember Yukimura.

Councilmember Yukimura: I think we all agree with the original intention of the ADU Bill that families be able to provide housing for their children. There was a problem that it is on agriculture land and you cannot keep subdividing and re-subdividing, so at some point that intention has to stop and you have to look someplace else. To the extent that there was land, which tends to be on agricultural land, you can honor that intention; however, I am not sure that lifting the sunset date is going to enable people to build a house on it. It has been twenty-nine (29) years or so and the families have not found the wherewithal to build a house. If we really want to help them build a house, we would work with Housing to figure out how we can get them some loans or help qualify them for financing or something so they can actually build those houses. That may be the better kind of help than extending the date beyond what has already been extended. I think that lifting the sunset date does make it more vulnerable to speculation. One of the ideas that I raised very early on was on first reading where I asked Mr. Hull about transfer of

development rights, that if it is sold to a non-family member, it could be transferred out of agriculture into an urban area so that you achieve the goals for agricultural land, which is not increased density if it is not going to help the family *per se*. It will help the family because they will get a lot of money for that, but it will be moved to an urban area. Obviously, they have not pursued the idea or looked at it, but I have been exploring the wording for an amendment and I have not been able to really develop it. We have several goals here: we want to protect the integrity of agricultural land, but we want to help families give housing to their family. If it does not go to their family, we rather not have it on agricultural land. That was kind of the reasoning that I have been looking at.

Committee Chair Chock: Mauna Kea, can I ask you to come up? I will suspend the rules. I do not want to get too far off the subject of what is on the agenda, but when might we hear back from you? It looks like there are several questions that were asked, not only from the Administration.

There being no objections, the rules were suspended.

MAUNA KEA TRASK, County Attorney: For the record, Mauna Kea Trask, County Attorney. We are going to endeavor to get it done within the two (2) weeks since this is an important issue for both the Administration and the Council and they want it to be addressed quickly. We will make it a top priority and set aside some other matters in order to effectuate that. We appreciate the time. I think there are a lot of complex issues and there have been statements/opinions rendered and written...I assumed written statements made and non-written statements on the floor, and we would like to provide you and the Administration the clear policy guidance in writing for this issue and moving forward so that there is not the perception or actual conflict between what was said today and tomorrow.

Committee Chair Chock: Okay. Thank you. Councilmember Kualii.

Councilmember Kualii: We appreciate you being as quick as you can in two (2) weeks, but I would just make the point that there really is no hurry because we have until 2024 to figure this out.

Committee Chair Chock: Thank you. I will call the meeting back to order. The motion is to approve at this point. Any further discussion before we take the vote? Councilmember Kagawa.

There being no objections, the meeting was called back to order, and proceeded as follows:

Councilmember Kagawa: I think seeing that there is a pretty close vote coming up if I am reading everybody right, I think that if there is a close vote, we should do the right thing and defer it for two (2) weeks and maybe we can have a closer to unanimous vote in the end. I am not a committee member, but I think if we do not want to tie up our council meetings with a lot of discussion, since this issue is going to have a lot of discussion, it would probably be better to keep it in committee for discussion.

Committee Chair Chock: Thank you. Any other committee members?
Councilmember Kaneshiro.

Councilmember Kaneshiro: I did not say anything yet, but I was kind of torn on this because I felt the same way as a lot of other members. Speculation is definitely the part that we are all kind of hesitant about because we do not know what is going to happen in ten (10) years and we do not know where the market is going to be. I know the sunset date does limit speculation because we sell a property and tell someone that they need to build within...if it starts today and they sell it next year, they have nine (9) years to build. If you sell it in two (2) years, then they have eight (8) years to build. I think the speculation does reduce. If you sell it in the ninth year and tell them you have to build the very next year, I think you reduce speculation a lot. I am pretty torn on it. I would not mind hearing what the attorney has to say about it and waiting on the deferral. I know the sunset date is a far way out, too, so it is not like we are up to a deadline here or anything, but I know it will give people a better feeling of where we are at and where we are thinking, but I guess on our part we need all of the information to kind of settle our nerves on that speculation part and what would happen. If we do not get the information from the attorney that we just might all vote no and have the sunset date come up, but if we get an opinion from the attorney saying that it is not an entitlement yet because they did not build a house and the trigger has not been set, so you can still do some negotiation with that part, then there may be an amendment and it could possibly go forward. For me, I am willing to go with the deferral and see what happens.

Committee Chair Chock: Thank you. Councilmember Hooser.

Councilmember Hooser: Restricting speculation is a noble and worthy purpose; there is no question about that. I just wanted to point out that restricting transfer prior to development of the lot does not prevent speculation. The owners could still build a house on the lot and sell it, but they cannot do that because they are entitled. Once they build, they are entitled. That is what the Planning Director said, I believe, and I could be stand corrected if anyone wants to point out that my information is not proper, but it is my understanding that you build a house, your entitled, and then we cannot take that away upon transfer. All this does is limits the speculation of a vacant lot, but it still allows people to build a house and sell it, so I think it is chasing this anti-speculation goal and there are other ways to approach it besides limiting the ability to transfer. Thank you.

Committee Chair Chock: Thank you. Councilmember Yukimura.

Councilmember Yukimura: If they build it, then they can sell it; that is correct. But if they cannot build it, then they cannot speculate on it. The thing that would be really interesting would be to see of all the ADUs that were permitted in this long period of ADUs, how many of them are still in their families. That would be interesting data to find out. Our whole purpose is to put this land into the families. So for those where the units were built, how many are still in the families would be an interesting question to answer.

Committee Chair Chock: Thank you. Further questions? Council Chair Rapozo.

Council Chair Rapozo: In fact, that is one of the questions I have noted. I want to see from the original ADU clearance form how many of them are still in the same ownership and how many were sold. I think Councilmember Kualii summed it up best when he said, "Right now, it is until 2024," so speculation can occur between now and 2024. The only difference I think if you set a value of a property with a sunset date of 2024 to build an ADU, you increase the value of that property over a property that cannot build. That just goes without saying; that is common sense. You have a property with no additional dwelling unit, the cost will be less. You increase the value by allowing and telling them that they can build another unit, and right now we are allowing that construction to be done by 2024. What happens when you take that 2024 out and make it into perpetuity, you again increase the value of that property because now you give the potential buyer a much larger window to build that house. Maybe he or she is not ready to build in the next ten (10) years or nine (9) years. Maybe they are looking at moving here in the next ten (10) or fifteen (15) years and building a second home. The value obviously increases even further, so I guess what I am saying is that I agree with Councilmember Kualii that by deferring this does not hurt anybody, except someone that may be in a land deal right now trying to sell a property, that needs the assurance that this will be in perpetuity or the deal may not go through. I am only saying that because I cannot think of any other reason why someone would say, "Let us not wait for two (2) more weeks or wait for the County Attorney's opinion," unless someone is in the middle of a deal and this is the deal-breaker, "If we do not get it into perpetuity, I am not buying your house." That is the only person I could think of that would be objecting this for more information. I appreciate Mauna Kea saying that he would make this a priority and getting back to us in two (2) weeks. Like I said, there are other legal questions that I have that I will be sending over, so I am not sure if he will be able to get to all of them. I think that for the general question that was asked, I think two (2) weeks...I appreciate that and we can get that done and make a good decision. Thank you.

Committee Chair Chock: Thank you. In a moment, I will entertain a motion to defer. I think what I have heard is that there may be some further solutions to the big question on speculation and I want to ask members to be proactive. Since we are possibly deferring it for two (2) weeks to get a little more feedback on additional questions, please put forth your ideas so that we can move through this and accomplish all of what the intention of this Bill is. At this time, I will entertain that deferral.

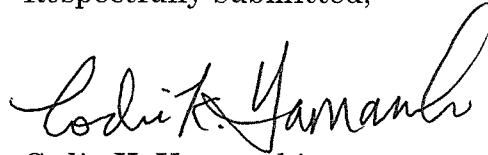
Councilmember Kagawa moved to defer Bill No. 2601, seconded by Councilmember Kaneshiro, and carried by the following vote:

FOR DEFERRAL:	Kagawa, Kaneshiro, Kualii, Chock	TOTAL – 4,
AGAINST DEFERRAL:	Hooser	TOTAL – 1,
EXCUSED & NOT VOTING:	None	TOTAL – 0,
RECUSED & NOT VOTING:	None	TOTAL – 0.

Committee Chair Chock: The motion passes. This concludes the business of the Planning Committee.

There being no further business, the meeting was adjourned at 10:11 a.m.

Respectfully submitted,



Codie K. Yamauchi
Council Services Assistant I

APPROVED at the Committee Meeting held on March 16, 2016:



MASON K. CHOCK, PL Committee